

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>STEPHEN ROBINS</b>	:	DETERMINATION
	:	DTA NO. 819929
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods March 1, 2001 through February 28, 2002,	:	
June 1, 2002 through August 31, 2002 and	:	
December 1, 2002 through February 28, 2003.	:	

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Petitioner, Stephen Robins, 97 Brookby Road, Scarsdale, New York 10583, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 2001 through February 28, 2002, June 1, 2002 through August 31, 2002 and December 1, 2002 through February 28, 2003.

On June 29, 2005 and July 12, 2005, respectively, petitioner, appearing *pro se*, and the Division of Taxation appearing by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by December 2, 2005, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner has established any basis warranting the cancellation of penalties and interest imposed on six notices of determination.

***FINDINGS OF FACT***

1. Rockwells Restaurant Corp. (“Rockwells” or the “corporation”) owned and operated restaurants known as Rockwells American Restaurants. Petitioner, Stephen Robins, was the corporation’s president, sole officer and shareholder.

2. On November 10, 2003, the Division of Taxation (the “Division”) issued six notices of determination to petitioner as a responsible officer of Rockwells Restaurant Corporation for the sales tax quarters ended May 31, 2001, August 31, 2001, November 30, 2001, February 28, 2002, August 31, 2002 and February 28, 2003.

3. The Division issued Notice of Determination (Assessment # L-023206460) to petitioner asserting sales and use tax due for the period March 1, 2001 through May 31, 2001 in the amount of \$46,321.87, penalty of \$14,114.18 and interest of \$16,428.88, for a current balance due of \$76,864.93. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation (\$70,283.70) on the quarterly sales and use tax return that it filed. However, after reducing the uncontested amount of tax due (\$70,283.70) by the amount of timely tax payments and credits made (\$23,961.83), a balance of tax due remained in the amount of \$46,321.87.

4. The Division issued Notice of Determination (Assessment # L-023206458) to petitioner asserting sales and use tax due for the period June 1, 2001 through August 31, 2001 in the amount of \$49,588.14, penalty of \$15,390.61 and interest of \$15,976.47, for a current balance due of \$80,955.22. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation (\$72,231.62) on the quarterly sales and use tax return that it filed. However, after reducing the

uncontested amount of tax due (\$72,231.62) by the amount of timely tax payments and credits made (\$22,643.48), a balance of tax due remained in the amount of \$49,588.14.

5. The Division issued Notice of Determination (Assessment # L-023206459) to petitioner asserting sales and use tax due for the period September 1, 2001 through November 30, 2001 in the amount of \$71,918.87, plus penalty of \$22,294.89 and interest of \$20,292.02, for a current balance due of \$114,505.78. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation (\$71,918.87) on the quarterly sales and use tax return that it filed. However, since no timely payments and credits were made, the entire amount of the uncontested tax remained due, i.e., \$71,918.87.

6. The Division issued Notice of Determination (Assessment # L-023206457) to petitioner asserting sales and use tax due for the period December 1, 2001 through February 28, 2002 in the amount of \$66,134.53, plus penalty of \$19,874.90 and interest of \$16,201.70, for a current balance due of \$102,211.13. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation (\$66,134.53) on the quarterly sales and use tax return that it filed. However, since no timely payments and credits were made, the entire amount of the uncontested tax remained due, i.e., \$66,134.53.

7. The Division issued Notice of Determination (Assessment # L-023206455) to petitioner asserting sales and use tax due for the period June 1, 2002 through August 31, 2002 in the amount of \$48,887.88, plus penalty of \$11,744.19 and interest of \$8,415.03, for a current balance due of \$69,047.10. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation

(\$71,562.69) on the quarterly sales and use tax return that it filed. However, after reducing the uncontested amount of tax due (\$71,562.69) by the amount of timely tax payments and credits made (\$22,674.81), a balance of tax due remained in the amount of \$48,887.88.

8. The Division issued Notice of Determination (Assessment # L-023206453) to petitioner asserting sales and use tax due for the period December 1, 2002 through February 28, 2003 in the amount of \$56,115.65, plus penalty of \$10,169.41 and interest of \$5,893.50, for a current balance due of \$72,178.56. The computation section of this Notice of Determination reflects that the Division did not challenge the amount of sales and use tax reported as due by the corporation (\$56,115.65) on the quarterly sales and use tax return that it filed. However, since no timely payments and credits were made, the entire amount of the uncontested tax remained due, i.e., \$56,115.65.

9. On March 18, 2004, petitioner filed a petition with the Division of Tax Appeals in which he protested the six notices of determination, on the basis that “reasonable cause exists for the elimination of all penalties” and “petitioner is a responsible Officer of a corporation that is or will be filing a petition.”

10. On August 2, 2004, the Division, by its representative, John E. Matthews, Esq., filed a motion for summary determination in this matter. In an Order dated February 3, 2005, the Division’s Motion for Summary Determination was denied by Administrative Law Judge Catherine M. Bennett who found that:

[s]ince petitioner was issued notices of determination which arose out of the sales and use tax liability of Rockwell’s [sic] Restaurant Corporation, and the corporation filed timely petitions protesting the same period prior to the petition filed by petitioner, the corporate petitions are deemed to include a protest by the responsible officer, and a separate (timely) petition of his own is not required by law for his protest of the merits to be within the jurisdiction of the Division of Tax Appeals.

11. In his affidavit, petitioner makes clear that he is the responsible officer of Rockwells Restaurant Corporation and that he does not dispute the amount of tax assessed or that the same is due and owing but rather seeks only the abatement of penalty and interest.

***SUMMARY OF PETITIONER'S POSITION***

12. Although the corporation's checks sent in payment of sales and use tax for periods in 1998 were returned for insufficient funds, petitioner maintains that he first learned about the returned checks for the tax quarters ending May 31, 1998 and August 31, 1998, during an April 15, 1999 telephone conversation with a Division representative. He asserts that he then reviewed the corporation's books and records and discovered that additional checks sent in payment of sales and use tax liabilities for subsequent periods in 1998 and early 1999 were returned for insufficient funds as well. In June 1999, the Division issued a collection notice to the corporation for sales and use tax liabilities for the tax quarters ending May 31, 1998 and August 31, 1998. Shortly thereafter, on behalf of the corporation, petitioner maintains that he sought to obtain a deferred payment agreement with the Division for those periods. Petitioner further maintains that rather than allowing the corporation to enter into a deferred payment agreement, the Division issued warrants that caused a number of the corporation's vendors to raise prices, require cash payments for goods and services and initiate collection lawsuits. He asserts that the restrictive actions by the corporation's vendors caused him to make misguided and poor business decisions on behalf of the corporation. Due to personal difficulties, petitioner contends that he was unable to focus on the corporation's business affairs and its ongoing financial problems, and, as a result, checks sent in payment of sales and use tax for some additional periods prior to those at issue herein were returned for insufficient funds. In January 2003, the corporation applied for amnesty for several periods preceding the sales tax periods at

issue herein (the amnesty program period only extended to sales and use tax liabilities up to February 28, 2001) (*see*, L 2002, ch 85, Part R, § 1[b]). Petitioner maintains that it was not until July 26, 2004, approximately 19 months later, that the corporation was able to take advantage of the tax amnesty program to which it had previously applied.

13. Petitioner claims that actions taken by the Division during periods prior to those at issue created a business environment such that it was impossible for him to effectively operate the corporation, borrow funds (personally or on behalf of the corporation), or sell any of the corporation's assets at or near market value to meet financial obligations. He further claims that the Division's failure to allow the corporation a deferred payment arrangement for sales and use tax liabilities for such earlier periods, its failure to expeditiously grant the corporation's application for amnesty for such earlier periods, the issuance of notices of determination as well as collection notices to him personally for periods already being challenged by the corporation in timely filed petitions and the motion for summary determination filed in the instant matter by the Division, gave him such severe emotional and physical distress that he was unable to properly focus on the corporation's business affairs. As a result, he claims that the corporation's financial difficulties continued throughout the periods at issue, allegedly resulting in the failure to pay sales and use tax due in a timely manner. In support of his assertions, petitioner submitted documentary evidence pertaining to periods prior to those at issue herein.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause

and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (*see, Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360).

B. As noted above, petitioner does not contest the tax assessed for the sales tax quarters ending May 31, 2001, August 31, 2001, November 30, 2001, February 28, 2002, August 31, 2002 and February 28, 2003, but rather seeks an abatement of penalties and interest for these periods. Petitioner's claim that the Division's failure to provide the corporation with the option of a deferred payment agreement with regard to sales tax periods prior to the ones at issue in an allegedly timely manner does not establish reasonable cause for Rockwells Restaurant Corporation's delay in paying ongoing taxes for the periods in issue. Additionally, petitioner's assertion that his ability to meet the corporation's financial liabilities and obligations was limited during the periods at issue because of the corporation's ongoing financial difficulties does not support a finding that the nonpayments for the sales tax quarters in issue were inadvertent or attributable to oversight. The record indicates that Rockwells Restaurant Corporation collected a substantial amount of sales and use taxes during the periods in issue, yet remitted only a small portion of the sales and use taxes due to the State. Specifically, the corporation collected sales and use taxes in the total amount of \$280,568.72 for the period March 1, 2001 through February 28, 2002 (four sales tax quarters) but remitted a total of only \$46,605.61, consisting of timely

partial tax payments and credits in the amount of \$23,961.83 and \$22,643.48 for the sales tax quarters ending May 31, 2001 and August 31, 2001, respectively. For the two remaining periods at issue, June 1, 2002 through August 31, 2002 and December 1, 2002 through February 28, 2003, the corporation collected sales and use taxes in the amount of \$71,562.69 and \$56,115.65, respectively. However, the corporation remitted timely tax payments and credits in the amount of only \$22,674.81 for the period June 1, 2002 through August 31, 2002. Given the magnitude of sales and use taxes collected and reported by the corporation for the sales tax quarters in issue, it is clear that the corporation was a going concern that obviously made purchases of supplies and paid expenses such as payroll, but chose to ignore its responsibility for the taxes it knew were due and dutifully reported to the Division for each quarter in issue.

Moreover, it has been held that reasonable cause for failing to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other more pressing obligations (*see, Matter of F & W Oldsmobile v. Tax Commn.*, 106 AD2d 792, 484 NYS2d 188). Finally, there is no statutory basis for the abatement of ordinary interest. While the abatement of penalty interest also required petitioner to establish a reasonable cause for the delay in paying the taxes at issue, as noted above, he has failed to do so (*see, Matter of Barrier Oil*, Tax Appeals Tribunal, July 29, 1999).

C. The petition of Stephen Robins is denied and the six notices of determination dated November 10, 2003 are sustained.

DATED: Troy, New York  
April 13, 2006

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE